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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1930.

No. 330

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

BRIEF OF PETITIONERS.

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

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OCTOBER TERM, 1930.

No. 330.

TWIN CITY PIPE LINE COMPANY AND INDUSTRIAL OIL & GAS COMPANY,

Petitioners,

vs.

HARDING GLASS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the trial court, United States District Court for the Western District of Arkansas, Fort Smith Division will not be reported, but is found at R. 249. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 258) is reported in 39 Fed. (2nd) 408.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered March 8, 1930. (R. 266.) On May 6, 1930 (within the time provided by the then rules) petitioners filed petition for rehearing (R. 267) which was denied on June 26, 1930 (R. 268). Petition for certiorari was filed August 2, 1930. Certiorari was granted October 20, 1930. (R. 268.) Jurisdiction is conferred upon this court by Section 240 (a), of the Judicial Code as amended by Act of February 13, 1925. The court below, in reversing the decree of the trial court, held that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing glass plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade and therefore contrary to public policy and void. (R. 261.) This decision (1) is in conflict with the decisions of the Circuit Courts of Appeal for the Tenth and Fifth Circuits on the same matter, (2) is untenable and in conflict with the weight of authority on an important question of general law and (3) is in conflict with the decision of the Supreme Court of Arkansas on an important question of local law. (Rule 38, Section 5.)

Question Presented.

Whether a covenant in an Arkansas contract between a public utility and one of its customers, by which the customer, an abnormally large user of natural gas, for a valuable consideration, agreed to purchase from the utility its requirements of natural gas for its two existing glass plants, at the rate fixed by public authority, so long as the utility could adequately supply same, is contrary to public policy and void.

STATEMENT OF THE CASE.

The court below reversed the decree of the trial court, and placed its decision upon the sole ground that a covenant in a written contract by which a customer of a natural gas utility, for a valuable consideration, agreed to take its requirements of natural gas for its two existing glass plants from the utility, at the rates fixed by public authority, so long as the utility could adequately supply same, was in partial restraint of trade, and, therefore, contrary to public policy and void, the announced theory for such a decision being that one of the parties to the contract was a public utility, and precluded, by reason of its status, from entering into a contract even in *partial* restraint of trade.

The controversy arose in this manner. In August, 1926, the respondent was taking the natural gas used by it at its two factories in the City of Fort Smith Arkansas, from the petitioner, Twin City Pipe Line Company. (R. 147.) The Twin City Pipe Line Company was engaged in the business of transporting gas by pipe line from gas fields adjacent to Fort Smith, Arkansas, to that city, where it sold same as a public utility under rates fixed by public authority, both to manufacturers and to the Fort Smith Light & Traction Company, which served domestic consumers. The Fort Smith Light & Traction Company was not connected with petitioners in any way, except that it was a customer. (R. 183.)

The petitioner, Industrial Oil & Gas Company, was engaged solely in producing natural gas (R. 154), and sold its entire production to petitioner, Twin City Pipe Line Company (R. 159), and these facts were known to respondent when the present contract was entered into.

(R. 159.) The petitioners were closely allied. At the time the contract was signed the majority of stock in each corporation was held by the same stockholders, but there was one large stockholder and director in Twin City Pipe Line Company who owned no stock in the Industrial Oil & Gas Company, and some stockholders in the Industrial Oil & Gas Company who owned no stock in Twin City Pipe Line Company. (R. 183-184.)

In the winter of 1925-1926, there had been a shortage of gas in Fort Smith, and growing out of that shortage and other controversies, litigation had ensued in which petitioners, respondent, and Fort Smith Light & Traction Company and S. H. Hale were parties.

In the decree in that consolidated cause (R. 110), the petitioner, Twin City Pipe Line Company, had obtained a judgment against respondent, Harding Glass Company, for $17,155.46, and Harding Glass Company had obtained a judgment over against Industrial Oil & Gas Company, for the same amount, and Harding Glass Company's prayer for injunction, specific performance, and damages was denied. See decree (R. 110) and opinions of trial court in that litigation. (R. 116, 129.) Appeals were taken from that decree to the Court of Appeals for the Eighth Circuit by Harding Glass Company (R. 112, 113) and by Industrial Oil & Gas Company. (R. 114.)

In August, 1926, the petitioners and respondent agreed to settle their differences, and the written contract, out of which the present litigation grew, was entered into. This contract is set out in full at (R. 144, 145), and is as follows:

> In consideration of the undertakings and agreements hereinafter set out to be done and performed by the Twin City Pipe Line Company and Industrial Oil & Gas Company and the Harding Glass Company, it is mutually agreed as follows:

(1) All judgments and decrees now entered for or against either of them or S. H. Hale, are to be satisfied and cancelled, and all former contracts between the Industrial Oil & Gas Company and the Harding Glass Company, and between the Twin City Pipe Line Company and the Harding Glass Company, are hereby abrogated as of September 1, 1926.

(2) All suits and appeals now pending between either of the parties hereto, or S. H. Hale, are to be dismissed and each party hereto, is to pay its own costs, all questions involved in said suits having been adjusted and settled.

(3) The Twin City Pipe Line Company agrees to lay at once an 8 inch pipe line from a connection with its 10 inch line at or near what is known as "The Carbarn" to a connection with its 8 inch line on Sixth Street near its regular station, said 8 inch line to run by the meter station where the gas furnished the Harding Glass Company is measured, and to be connected at said meter station with the lines furnishing the Harding Glass Company with gas.

(4) The Harding Glass Company agrees to take all its requirements of gas for its plants in the City of Fort Smith, Arkansas, from the Twin City Pipe Line Company so long as the Twin City Pipe Line Company can adequately supply its requirements and to pay for all gas furnished it hereunder, beginning September 1, 1926, at the regular sliding schedule of rates of twelve cents to fifteen cents, which is the rate now in effect for industries in the City of Fort Smith, Arkansas, or at such rate as may hereafter be fixed for industries in the City of Fort Smith by the proper regulatory body or court having jurisdiction. All gas consumed by the Harding Glass Company up to September 1, 1926, shall be paid for at the rate of ten cents per thousand cubic feet.

(5) The Harding Glass Company agrees that in the event there is a shortage of gas so that there is not enough to adequately supply the domestic consumer, that the Twin City Pipe Line Company may discontinue serving its gas, upon condition that the same character of service be given the Harding Glass Company that is given other industries in the

City of Fort Smith, Arkansas, and that his gas service be not discontinued unless that of other like industries is discontinued also.

Witness our hands this 30th day of August, 1926.

HARDING GLASS COMPANY,
By C. H. HARDING,
President.
INDUSTRIAL OIL & GAS COMPANY,
By W. R. MARTIN,
President,
TWIN CITY PIPE LINE COMPANY,
By W. R. MARTIN,
President.

I consent to the above.

S. H. HALE.

By the express terms of that contract, the petitioner, Twin City Pipe Line Company, was required to satisfy its judgment for $17,155.46 against respondent, Harding Glass Company, and the latter was required to satisfy its judgment over against Industrial Oil & Gas Company, and Industrial Oil & Gas Company and Harding Glass Company were required to dismiss their pending appeals, and Twin City Pipe Line Company agreed to build an additional pipe line for the benefit of Harding Glass Company—the right of Harding Glass Company to require Twin City Pipe Line Company to build such pipe line having been in issue and having been denied by the trial court in the litigation which was being settled. (R. 128, 252, 253.)

All covenants and agreements contained in this contract (save the covenant by which respondent agreed to take its requirements of gas from petitioner) were immediately, completely and fully performed by the parties. (R. 112, 113, 114, 145, 146, 253.) The pipe line was built at a cost of $4,489.82. (R. 146, 147.)

The clauses in the contract out of which the present suit grew are paragraphs four and five. (R. 145.) By

the terms of these paragraphs respondent "agrees to take all its requirements of gas for its plants in the City of Fort Smith, from the Twin City Pipe Line Company, so long as the Twin City Pipe Line Company can adequately supply its requirements," at the then existing rates for industries fixed by public authority, or at such changed rates as the public authorities may thereafter fix. (R. 145.)

Gas was taken and furnished pursuant to the above provisions down until January 2, 1929, at which time Harding Glass Company began to take practically all of its requirements from its own subsidiary corporations. (R. 149, 150, 208, 226, 227, 229, 230.)

The present suit was started when Harding Glass Company had announced its intention (R. 148-150) of violating the contract and taking its own gas from its own subsidiaries. No excuse or justification for this course of conduct was offered (R. 150, 226, 227) except the alleged invalidity of the contract.

This suit was brought to enjoin the respondent from violating its contract in the particulars set forth and a specific performance of the plain terms of that contract was sought and the bill concluded with a prayer for general relief. (R. 1-8.)

The trial court entered a decree enjoining respondent (R. 20) for reasons set forth in its unpublished opinion. (R. 249.) The Court of Appeals reversed this decree and remanded the cause with directions to dismiss plaintiffs' bill (R. 266-267), upon the sole ground that such a "requirements" contract was in *partial* restraint of trade, and that where one of the parties is a public utility and the other party is one of its customers, a contract even in partial restraint of trade is contrary to public policy. (R. 261.) This court granted certiorari. (R. 268.)

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In not holding that a covenant in an Arkansas contract between a public utility and one of its customers, by which the customer, an abnormally large user of natural gas, for a valuable consideration, agreed to purchase from the utility its requirements of natural gas for its two existing glass plants, at the rates fixed by public authority, so long as the utility could adequately supply same, is valid and enforceable.

2. In holding that a covenant in an Arkansas contract between a public utility and one of its customers, by which the customer, an abnormally large user of natural gas, for a valuable consideration, agreed to purchase from the utility its requirements of natural gas for its two existing glass plants, at the rate fixed by public authority, so long as the utility could adequately supply same, is contrary to public policy and void.

SUMMARY OF ARGUMENT.

Point One.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

ARGUMENT.

Point One.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER.

The court below, in holding the contract void, puts its decision on the ground that one of the parties is a public utility, and therefore, for that reason alone, precluded from entering into a contract which can be construed as being even in partial restraint of trade.

A diametrically opposite conclusion is reached by the Court of Appeals for the Tenth Circuit, in passing upon an essentially similar natural gas "requirements" contract *between a public utility* and the City of Iola, Kansas, *one of its customers.*

Griffin, et al. v. *Oklahoma Natural Gas Corporation*, 37 Fed. (2nd) 545.

That court affirmed a decree which enjoined the customer from taking from another its natural gas requirements for the operation of its municipal plant and for resale to the inhabitants of the city, holding in answer to the plea that the contracts were void because in restraint of trade, that the contracts were reasonable, and therefore valid, even though in *partial* restraint of trade.

The following short quotations from the opinion of the court below, and from the opinion in the Griffin case sharply illustrate the conflict between the two decisions on the same matter.

The Court of Appeals for the Eighth Circuit, in its opinion in the present case, (R. 261) quoted with ap-

proval from the decision in *Coombs* v. *Burke*, 40 Cal. App. 8, as follows:

> "Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful." (Greenhood on Public Policy, p. 180.)
>
> "Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases). As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced."

But the Court of Appeals for the Tenth Circuit in the Griffin case first pointed out that the City of Iola, in its "business" capacity, had entered into a contract to take from appellee's assignor "all the natural gas required by the city for fuel in the operation of its electric light and water plant," and then said in affirming a decree which enjoined a breach of that contract:

> "Counsel for the City and Griffin further contend that the contracts are void because in restraint of trade. If the restraint were reasonable, under the particular facts and circumstances of the case, the contracts are not invalid because of such restraint." *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396 (and other cases).

The two cases cannot be differentiated on the facts. An analysis of the undisputed facts, in the two cases, simply accentuates the conflict between these decisions on the question of law.

Both cases involved a contract for the supply of the fuel requirements of an existing industrial plant by a public utility. In the Griffin case the plaintiff, a public utility acquired the contract with the City of Iola by mesne assignments from J. B. Kirk Gas & Smelting Co.

Both contracts were supported by an adequate consideration. In the instant case, that consideration was not simply the mere agreement on the part of the utility to furnish the fuel. An important consideration, which supported the covenant of the customer, was the settlement of the then pending litigation between the parties. The petitioner, Twin City Pipe Line Company, pursuant to the covenants contained in the contract requiring it to do so, (R. 145) satisfied a judgment which it had obtained against the customer amounting to more than $17,000, (R. 110-111) and in addition thereto, and pursuant to the terms of the contract built a pipe line at an expense of over $4,000, (R. 146-147) which the trial court in the previous litigation had held it was not obligated to build, (R. 128, 252-253) and the petitioner, Industrial Oil & Gas Company, dismissed its pending appeal. (R. 114-115.) The adequacy of this consideration cannot be questioned.

Mississippi River Logging Co. v. *Robson* (C. C. A. 8th) 69 Fed. 773.

The very terms of the contract, and the character of consideration, moving from the utility, show that the contract was entered into primarily for the purpose of settling pending litigation between the parties, and for the protection of necessary investment of the utility to serve this particular and abnormally large customer, and that it was not part or parcel of any scheme by which the utility sought to tie up industries generally in order to avoid competition. There is no evidence in the record that any similar contract was entered into with other industries.

Carter-Crume Co. v. *Peurrung,* (C. C. A. 6th) 86 Fed. 439.

The contract in the instant case was made between the

utility and a window glass company, while the contract in the Griffin case was between a utility and a municipal corporation. But the opinion in the Griffin case makes plain that the city entered into the contract in that case in its "business" and not in its "governmental" capacity, so there is no distinction between the cases on this ground.

In the Griffin case the utility spent large sums of money after the contract was signed in putting itself in position to furnish the gas. In the instant case one petitioner built a $4,000 pipe line in compliance with the contract, (R. 146-147), while the other has spent over $70,000 in drilling new gas wells to the end that respondent might be adequately supplied. (R. 154-155.)

The contracts in the Griffin case ran for a term of five years, but further provided that the utility should not be required to furnish gas nor be liable for shortage caused by failure of gas in the territory from which the utility obtained its supply, or because of failure of the pressure of the gas wells.

The contract in the case at bar was for as long as the utility could adequately supply the gas. The industry had been buying gas from the utility for a number of years and knew its course of supply, (R. 154-159) and the testimony of respondent's own president makes plain that a contract for a shorter period of time, in view of the improvements which it contemplated, and the character of manufacturing in which it was engaged, would have been of no value to it. (R. 223, 224, 226, 228.)

In other words, no window glass manufacturer would *contract* for gas for a less period of time than the life of the gas field, and in view of the known exhaustibility of gas fields, it is difficult to see how the contract could be condemned as unreasonable on this ground. The sub-

ject matter of the contract, natural gas, when taken in connection with the character of business in which the manufacturer was engaged, demanded a contract for the life of the gas field. In this connection, see *Webster* v. *Williams,* 62 Ark. 101, and *Fowle* v. *Park,* 131 U. S. 88, both of which are discussed hereafter.

The opinion of the court below emphasizes throughout the inability of a public utility to enter into a contract, whether with its customers or others, which involves any restraint of trade, however partial, while a "requirements" contract, such as is involved in both cases, is recognized as reasonable and valid by the Court of Appeals for the Tenth Circuit in the Griffin case, and no distinction is made in that case, because the person supplying the customer happens to be a public utility.

The decision of the court below is also in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Montgomery Traction Co.* v. *Montgomery Light and Water Power Co.,* 229 Fed. 672. The contract in that case obligated the traction company to purchase from the power company "exclusively for the period of fifteen years * * * such direct electrical current * * * as it may require for propelling, lighting and heating its passenger and freight cars" and other purposes, in and about the City of Montgomery, Alabama. The traction company attempted to discontinue receiving electrical current from the power company and take it from another source. The power company instituted suit to enjoin the traction company from receiving current from any person other than the power company. A demurrer to the bill was overruled by the trial court for the very cogent reasons set forth in its opinion reported as *Montgomery Light and Water Power Co.* v. *Montgomery Traction Company,* 191 Fed. 657. After a hearing on the merits, the trial court en-

tered a decree perpetually enjoining the traction company from taking electrical current from any person other than the power company during the term covered by the contract and so long as the power company performs its part of the contract. *Montgomery Light and Water Power Co.* v. *Montgomery Traction Co.*, 219 Fed. 963. After a hearing on the merits, the trial court entered a decree perpetually enjoining the traction company from taking electrical current from any person other than the power company during the term covered by the contract and so long as the power company performs its part of the contract. This decree was affirmed by the Circuit Court of Appeals, Fifth Circuit, in the case above referred to.

The contract in the Montgomery case is almost identical with the case at bar and the relief granted by the decree in that case is in accord with the views expressed in the opinion of the trial court in the case at bar.

The decision below is in conflict with the decisions of the Court of Appeals for the Fifth Circuit in the *Montgomery Case* and with the decision of the Court of Appeals for the Tenth Circuit in the *Griffin Case*, both of which are in accord with the great weight of authority.

Point Two.

THE DECISION OF THE COURT BELOW DECIDES AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY THAT IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

The validity of contracts whereby a purchaser promises to buy his "requirements" of a commodity from a seller, has been sustained in nearly every jurisdiction in the United States. Indeed, it would be difficult to find a principle of law more definitely established than the

doctrine applicable to the validity of requirements contracts.

The following cases uphold the validity of such contracts:

Bulkley v. *United States* (1874), 19 Wall. 37.
Brawley v. *United States* (1878), 96 U. S. 168.
Parish v. *United States* (1886), 100 U. S. 500.
Smoot v. *United States* (1915), 237 U. S. 38.
United States v. *Purcell Envelope Co.* (1919), 249 U. S. 313.
Pittsburg Plate Glass Co. v. *H. Neuer Glass Co.* (C. C. A. 6th, 1918), 253 Fed. 161.
Lima Locomotive & Machine Co. v. *National Steel Castings Co.* (C. C. A. 6th, 1907), 155 Fed. 77.
Manhattan Oil Co. v. *Richardson Lubricating Co.* (C. C. A. 2nd, 1902), 113 Fed. 923.
Marx v. *American Malting Co.* (C. C. A. 6th, 1909), 169 Fed. 582.
T. W. Jenkins & Co. v. *Anaheim Sugar Co.* (C. C. A. 9th, 1918), 247 Fed. 958.
Rockhill Iron & Coal Co. v. *City of Taunton* (C. C. A. 1st, 1921), 273 Fed. 96.
National Pub. Co. v. *International Paper Co.* (C. C. A. 2nd, 1920), 269 Fed. 903.
Texas Co. v. *Pensacola Maritime Corp.* (C. C. A. 5th, 1922), 279 Fed. 19. (See also 292 Fed. 61; 300 Fed. 51.)
Mills-Morris Co. v. *Champion Spark Plug Co.* (C. C. A. 6th, 1925), 7 Fed. (2nd) 38.
Sterling Coal Co. v. *Silver Spring Bleaching & Dyeing Co.* (C. C. A. 1st, 1908), 162 Fed. 848.
Conley Camera Co. v. *Multiscope & Film Co.* (C. C. A. 8th, 1914), 216 Fed. 892.
Diamond Alkali Co. v. *P. C. Tomson & Co. Inc.* (C. C. A. 3rd, 1929), 35 Fed. (2nd) 117.

Tampa Shipbuilding & Eng. Co. v. *General Const. Co.* (C. C. A. 5th, 1930), 43 Fed. (2nd) 309.

Ehrenworth v. *George F. Stuhmer & Co., Inc.* (1920), 229 N. Y. 210.

Lone Star Gas Co. v. *Municipal Gas Co.* (1928), 117 Tex. 331.

Cox, Inc. v. *Humble Oil & Refining Co.* (1929), Comm. of App. Tex. 16 S. W. (2nd) 285.

Big Four Ice & Cold Storage Co. v. *Williams* (1928), Court Civ. App. Tex. 9 S. W. (2nd) 177.

Minnesota Lumber Co. v. *Whitebreast Coal Co.* (1895), 160 Ill. 85.

Jackson Hill Coal & Coke Co. v. *Merchants' Heat & Light Co.* (1923), 193 Ind. 422.

C. G. Blake & Co., Inc. v. *W. R. Smith & Son, Limited* (1926), 147 Va. 960.

Hendler Creamery Co. v. *Lillich* (1927), 152 Md. 190.

Elk Refining Co. v. *Falling Rock Cannel Coal Co.* (1922), 92 W. Va. 479.

Home Gas Co. v. *Mannington Co-Operative Window Glass Co. et al* (1907), 63 W. Va. 266.

Albany Power & Mfg. Co. v. *City of Albany* (1909), 133 Ga. 375.

O'Bryan v. *Mengel Co.* (1928), 224 Ky. 284.

Freedom Oil Works Co. v. *Williams* (S. C. Penn. 1930), 152 Atl. 741.

Requirements contracts such as we have in the case at bar and in the Griffin and the Montgomery cases are commonplace. Under such contracts various requirements of the government have been supplied. Thus, in *Bulkley* v. *United States, supra,* the contract was for the transportation of supplies from Fort Leavenworth to

army posts farther west "which might be required by the government"; in *Parish* v. *United States, supra,* the "whole amount of ice required" at certain designated points by Union armies in the field, was contracted for by the government; in *Brawley* v. *United States, supra,* the contract was construed by this court as an engagement to furnish all of the wood "determined to be necessary by the post commander for the regular supply (of Fort Pembina) for the year, in accordance with army regulations." The contract involved in *United States* v. *Purcell, supra,* obligated the post office department to purchase "stamped envelopes and newspaper wrappers in such quantities as may be called for by the department" during a four-year period; in *Smoot* v. *United States, supra,* the government contracted to purchase "the filter sand required by the United States for a filtration plant."

It is a common business practice for manufacturers to contract for the purchase of their requirements of fuel or material. In *Lima Locomotive and Machine Co.* v. *National Steel Castings Co., supra,* the contract covered all the requirements of a manufacturer for steel castings for the remainder of the present year; in *Marx* v. *American Malting Co., supra,* a brewery contracted for "all their requirements" of malt to a certain date; in *Rockhill Iron & Coal Co.* v. *Taunton, supra,* the contract covered all the bituminous coal required by a municipal electric light plant for a year and one-half period; in *National Publishing Co.* v. *International Paper Company, supra,* a newspaper publisher contracted to buy "the entire supply of half-tone newspaper required to print rotogravure supplements" for a period of one year; in *Sterling Coal Company* v. *Silver Springs Dyeing Company, supra,* a manufacturer contracted for its "entire consumption of coal" for a certain period of time.

In West Virginia where natural gas has been available for fuel in recent years, the fuel requirements of manufacturers have been purchased under requirements contracts. For example: In *Elk Refining Co.* v. *Falling Rock Cannel Coal Co., supra,* the fuel requirements for a refinery were provided for under a contract containing the following terms: "The seller agrees to sell and the buyers agree to buy all the natural gas that they may need for lights, fuel or other purposes for which gas may be used in connection with the operation of said refinery."

In *Lone Star Gas Co.* v. *Municipal Gas Co.* (1928), 117 Tex. 331, a gas distribution company contracted to purchase its needs and requirements of natural gas from a producing company. *Both companies were public utilities.* The seller proposed to forfeit the contract for alleged breaches by the buyer. The buyer filed suit to enjoin forfeiture and for specific performance of the contract. The case went to the Supreme Court of Texas on the pleadings. That court held that the contract was valid and that the buyer upon proof of its allegations would be entitled to specific performance of the agreement.

In *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co. et al.* (Supreme Court of Appeals, West Virginia, 1907), 63 W. Va. 266, a natural gas company had contracted to sell gas for five years in quantities sufficient to supply a "window glass manufactory of at least 12 pots." The Gas Company's supply failed. The Glass Company discontinued purchasing gas from the Gas Company, acquiring its needs elsewhere. The Glass Company had brought an action at law for damages for the failure of the Gas Company to supply sufficient gas. This bill was brought by the Gas Company to restrain the Glass Company's action

at law on the basis that there had been fraud in making the contract, in that the gas requirements had been misrepresented. The Supreme Court of Appeals dismissed the Gas Company's bill and held the contract to be a valid contract obligating the gas company, *a public utility,* to furnish to the glass company all the gas required for the specified plants. This case is directly in point.

In *Albany Power & Mfg. Co.* v. *City of Albany* (Supreme Court of Ga. 1909), 133 Ga. 375, a power company had contracted to furnish such electric current to the city "as said party of the second part may require for its own purpose." The power company brought suit to recover a specified amount on the theory that it constituted a minimum charge under the contract. The court held *that the contract was a "requirements contract"* and that the city was liable for energy actually used. This case presented the same question involved in the case at bar.

In *Ehrenworth* v. *George F. Stuhmer & Co., Inc.* (1920), 229 N. Y. 210, the Court of Appeals of New York sustained a judgment allowing recovery in an action at law brought by a bread peddler for violation of an oral contract, enduring as long as the parties remained in business, whereby the peddler promised to purchase from the defendant all the black bread that he would require. Such a contract indicates a strong tendency to monopoly because the plaintiff had promised to sell no other kind of black bread in his territory. Although that contract, made between a baker and a middleman, directly affected the bread supply of the whole buying public in his territory, *the question of partial restraint of trade was not even mentioned.*

In *Cox, Inc.* v. *Humble Oil & Refining Co.* (1929), 16

S. W., 2nd, 285, the Commission of Appeals of Texas affirmed a judgment which allowed recovery on a contract wherein the plaintiff promised to take all gasoline used in his filling station from the defendant. *Although the question of restraint of trade was introduced in the case, the court specifically held that the contract was a valid and enforceable contract.* The contract was similar to the contract between the Harding Glass Company and the Twin City Pipe Line Company.

Requirements contracts assure the buyer of an adequate and continuous supply of the commodity needed at all times without subjecting him to risks of loss incident to contracts providing for the purchase of a specified quantity at a designated time. Without the assurance of distribution which such contracts give, it would be extremely hazardous for sellers to carry on extensive development of natural resources or to expand equipment for manufacturing. To vitiate such contracts is to condemn a well recognized business practice without promoting or protecting any public interest.

The decision of the court below is in direct conflict with the weight of authority on the question of the validity of requirements contracts. It announces a new doctrine applicable only to one class of requirements contracts—the requirements contracts of a public utility. It excepts such contracts from the application of the universally recognized rule sustaining the validity of requirements contracts, on the sole ground that such contracts, when made by a public utility for the sale of its commodity are in partial restraint of trade and therefore against public policy and void.

Undoubtedly, all requirements contracts have some tendency to restrain the absolute freedom of trade. A manufacturer using coal for fuel in his operations agrees

to buy five hundred tons during the winter of 1930; such a contract might, by a process of reasoning, be said to be in partial restraint of trade because it would prevent a competitor of the seller from supplying a part of the coal, yet it would hardly be urged that such a contract is illegal because in partial restraint of trade. Certainly the character and effect of such a contract would not be changed merely because the seller was a public utility and the commodity sold was gas or electricity instead of coal. Yet the court below makes a distinction in the application of the doctrine to such contracts. This distinction is not justified in reason (1) because it is apparent that a contract of this character between a public utility and an abnormally large industrial user of its service is reasonably required as a matter of sound business in order to protect the large investment that the utility must make in order to serve adequately such a customer; otherwise the customer is left free to abandon at any time the use of the investment in plant and line capacity or the development of gas producing territory (as in the case at bar) made specially to serve it, and it is apparent that such a course must lead to business disaster or at least must seriously cripple the utility in its ability to serve properly the general public, and (2) because it is apparent that a "requirements" contract between a public utility and a large industrial user of its service is far less susceptible to attack for illegality based upon monopolistic tendencies than similar contracts of purely private corporations where, as in the case at bar, the rates and service of the public utility are regulated by public authority. Under Act 124 of the Acts of Arkansas 1921 (applicable section quoted in Appendix), the City Commission of the City of Fort Smith is vested with the power to make all reasonable and proper rules and regulations with refer-

ence to the operations of the Twin City Pipe Line Company within the municipality (including the power to fix and regulate rates and to order the performance of any duty devolving on it under its franchise or contracts); outside the corporate limits of the municipality the power of regulation is vested in the Arkansas Railroad Commission. Private corporations are, of course, not subject to such regulation. It is impossible to divorce the business of a public utility from business considerations logical to the conduct of all business.

By the terms of the contract, involved in the present case, the Pipe Line Company did not agree not to sell gas to others. It did not agree to limit or to restrict its business as a public utility. The gas, to be furnished under the terms of the contract, was to be furnished at the then legally established rates, or at such rates as the public authorities might thereafter establish. The Harding Glass Company did not agree that it would not build other plants, or in the event that it did do so, did not agree to take its gas for such new plants from petitioner. It simply agreed to buy its requirements for its existing plants from the petitioner.

The court below quotes with approval from *Coombs* v. *Burke*, 40 Cal. App. 8, on the proposition that where a contract affects a business impressed with a public interest no restraint, however partial, nor however reasonable, can be tolerated. The opinion in that case was announced by an intermediate court of the State of California in 1919, and has never been cited or approved by any other court, except by the court below in the case at bar. The authorities cited in the Coombs case do not support the sweeping doctrine announced.

The court below, cites *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396. In that case the plaintiff brought suit

for services in negotiating and consummating a contract between the defendant gas company and its rival and competitor in the gas business in the City of Baltimore. By that contract the parties expressly agreed that they would no longer compete, although such agreement, at least as to one company, was "directly in the teeth of the statute" (of Maryland) which specifically forbade any such agreement. By the terms of the contract one of these competitors was given the authority to fix the prices to be charged by both, and their joint profits were to be divided in accordance with provisions set forth in the contract. Neither party was to solicit the customers of the other, and one of the parties was forbidden to extend its lines, thus disabling itself from performing its public duties. General expressions in the opinion are, of course, applicable to the particular facts before the court. The Court of Appeals for the Tenth Circuit cites the Gibbs case in support of the conclusion reached by it in *Griffin, et al.* v. *Oklahoma Natural Gas Corporation* (*supra*). A contract similar to that involved in the Gibbs case, between private individuals, would be contrary to the public policy of Arkansas. *Shapard* v. *Lesser*, 127 Ark. 590.

Another case cited below is *West Virginia T. Co.* v. *Ohio R. P. L. Co.*, 22 W. Va. 600. This case had to do with the granting of an exclusive easement for laying pipe lines, one of the conditions of the easement being a restriction on the grantor not to grant similar easements to any other parties. Its relevance to the contract involved in the present case is more than doubtful, especially in view of the later West Virginia cases which uphold "requirements" contracts of a manufacturer for his gas supply. *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co., et al.*, 63 W. Va. 266; *Elk Refining Co.* v. *Falling Rock Cannel Coal Co.*, 92 W. Va. 479.

In the case of *Salt Co.* v. *Guthrie* (1880), 35 Ohio State 672, also cited in the opinion below, it appeared that all the salt manufacturers within a large salt producing territory by written agreement formed a voluntary association, the stated purpose of which was to regulate the price of salt manufactured by its members. The court properly held such an agreement was in general, not partial, restraint of trade and therefore void on the grounds of public policy. It is apparent the case has no bearing upon the case at bar.

In the case of *Perceval* v. *Public Service Commission*, 163 App. Div. 705, 707, cited in the opinion below it appeared that a public utility supplying electric current required of all applicants for service an agreement that applicants would not take electric current from any other source. The relator refused to sign such an agreement as it desired to take its service during the day from an adjoining factory. The court held the utility must give the service and could not require the agreement. This case is not analogous to the case at bar where no conditions were imposed to giving to the Glass Company the exact amount of service it requested except that the amount of gas applied and contracted for should be used for a period reasonably adapted to protect the investment required to give that service.

Central New York Telephone & Telegraph Co. v. *Averill*, 199 N. Y. 128; *United States Telephone Co.* v. *Central Union Tel. Co.*, 202 Fed. 66; *Gwynn* v. *Citizens Telephone Co.*, 69 S. C. 434; and *Union Trust & Savings Bank* v. *Kinlock Long Distance Tel. Co.*, 258 Ill. 202, likewise cited below, all involve contracts for telephone service which would directly inconvenience and injure the public by curtailing and restricting the service available to telephone users generally. This is aptly expressed

by the Court of Appeals of New York in the *Averill case* as follows:

> "The feature of the modern telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with hundreds and oftentimes thousands of others. This makes it an instrument of great public convenience and utility, the usefulness of the service offered by each company being directly proportionate to the number of persons who can be reached thereby. * * *
>
> In return for the franchise which a telephone corporation receives from the state—including as it does the privilege of occupying highways and the right to exercise the power of eminent domain—it undertakes to furnish each customer with telephone service to as many other customers as it can obtain at the rates which the law permits it to charge; and the law implies an obligation on its part to do nothing to lessen the facilities of the public to procure a more widely extended service. * * *
>
> It is true that the customers who had voluntarily entered into the agreement of exclusion would have no just ground of complaint themselves; but how about the customers of the rival company who are thereby shut out from communication by telephone with their neighbors? They are not parties to the contract, and yet they suffer its consequences, although they constitute a portion of the public for whose benefit the franchise was granted to the corporation whose action deprives them of the more extended telephone service which otherwise they might enjoy.
>
> It is on this broad ground that I think we ought to condemn the exclusive clause of this contract as against public policy, and therefore void."

Reasonably adequate service on the part of the telephone company was described by the Court of Appeals of the Sixth Circuit in the *United States Telephone Company case, supra*, as follows:

> "A long-distance telephone service is not necessarily reasonably adequate just because it reaches the city or district of residence of the person with

whom communication is desired. A railroad service may be beyond criticism if all passengers and freight are delivered at one station in a city, from which station the passengers go their several ways, and to which station consignees come for their freight; a telegraph service may be complete if the messages reach over the wire only one central office, from which they are distributed by other means; but in telephone communication the ultimate thing sought is personal conversation, and a long-distance telephone service has not reached its full usefulness until the user, in one place, can talk directly with the residence or place of business of the telephone users in another place. It is not now important where the line will be drawn in determining what is reasonably adequate service. That will depend upon many conditions, some of which cannot be foreseen. It is enough to say that where a local telephone company contracts that it will not send or receive any long-distance messages, excepting in cooperation with one specified long-distance company, it thereby abdicates its power to give a service which may turn out to be clearly within any proper definition of 'reasonably adequate'."

The character of the contracts considered in the above cases is essentially different from that involved here. An exclusive contract between a telephone company and one of its customers impairs the very element—intercommunication between the largest number of persons—which it is the very purpose of telephone service to promote. This element is wholly absent from contracts for gas service. A requirements contract between a gas utility and a large gas consumer, such as we have in the case at bar, does not directly or indirectly affect the adequacy of the service to other consumers or to the public generally. The Harding Company can only consume so much gas at its existing plants. It makes no difference to the public, whether the Harding Company takes all of its fuel requirements from the Twin City Company, or whether it splits its fuel requirements between that

company and its own subsidiary. The Harding Company cannot consume more gas at its two plants than it needs.

In the *Kinlock Long Distance Telephone Company case* the Illinois Supreme Court pointed out that there was little analogy between cases involving exclusive contracts of telephone companies and those involving contracts of railroad companies for the exclusive use of sleeping cars, express cars, wharves and docks because of the essential difference in the character of such contracts, in the nature of the use to be made of the property, in the character of the service to be rendered, and in the agents to be employed and agencies maintained.

We submit, therefore, that the telephone cases cited by the court below are not in point because of the essential difference in the character of the contracts involved and in the essential difference in the business of a telephone company and a gas company and the character of the service rendered by each.

Chicago Gas Light & Coke Co. v. *People's Gas Light & Coke Co.*, 121 Ill. 530; *Charleston Nat. G. Co.* v. *Kanawha Nat. G. L. & F. Co.*, 58 W. Va. 22; *State* v. *Portland Nat. Gas & Oil Co.*, 153 Ind. 483; and *City of Detroit* v. *Mutual Gas Co.*, 43 Mich. 594, cited by the court below, involved contracts providing for the division of territory between competing gas companies and combinations of rival gas companies.

The case of *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.*, 171 Pa. 284, involved a contract whereby an iron company agreed to give all its traffic to a railway company. This case was dismissed by the court below as "stating the public policy of Pennsylvania." The Pennsylvania court in holding the contract valid did not base its decision on the public policy of Pennsylvania in

regard to contracts of public utilities said to be in partial restraint of trade because the court expressly held in regard to the contract that "it is not in restraint of trade for its express purpose and necessary effect are to increase both trade and population."

The remaining authorities cited by the court below, in support of its opinion, undoubtedly sustain the general principles of law in respect to monopoly and combinations in restraint of trade set forth therein. We believe it evident, however, that those general principles are not applicable to or determinative of the case at bar.

"Requirements" contracts have been sustained by this court in *Bulkley* v. *United States, supra; Brawley* v. *United States, supra; Parish* v. *United States, supra; Smoot* v. *United States, supra;* and *United States* v. *Purcell Envelope Co., supra.* No decision by any court has come to our attention (except possibly the *Coombs case*) holding invalid a "requirements" contract of the character involved here between a public utility and one of its customers, because in partial restraint of trade, while the Circuit Court of Appeals for the Tenth Circuit, in *Griffin, et al* v. *Oklahoma Natural Gas Corp., supra,* the Circuit Court of Appeals for the Fifth Circuit in *Montgomery Traction Co.* v. *Montgomery Light & Water Power Co., supra,* the Supreme Court of Texas in *Lone Star Gas Co.* v. *Municipal Gas Co., supra,* the Supreme Court of Appeals of West Virginia in *Home Gas Co.* v. *Mannington Co-Operative Window Glass Co. et al, supra,* and the Supreme Court of Georgia in *Albany Power & Mfg. Co.* v. *City of Albany,* have upheld the validity of such contracts by public utilities.

We submit, therefore, that the decision of the court below is untenable and is not sustained by reason or authority.

Point Three.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS ON AN IMPORTANT QUESTION OF LOCAL LAW.

The court below, in its opinion, said:

> "The public policy to be ascertained is the public policy of Arkansas. *Northwestern Life Insurance Co.* v. *Johnson*, 254 U. S. 96."

and

> "The Constitution of Arkansas (Art. 11, Sec. 19) contains this provision: 'Perpetuities and monopolies are contrary to the genius of a republic and should not be allowed.' No specific determination is found in the statutes or decisions of the Supreme Court of Arkansas applicable to the exact situation. That Court has decided many questions involving alleged restraints of trade, (citing cases) in recognition of the *common law principles applicable.*" (Italics ours.)

It is perfectly obvious from what is quoted above and from the entire opinion, that the court below based its decision upon its own conception of what the public policy of Arkansas should be, after having reached the conclusion that it was not precluded from so doing by the local statutes or decisions.

But it must be conceded that the Supreme Court of Arkansas has said that contracts between private individuals are valid when only in partial restraint of trade. The case of *Webster* v. *Williams*, 62 Ark. 101, is cited by the court below. In that case a contract of a physician to retire permanently from the practice of medicine in a given city was upheld against the plea that such a contract was in unreasonable restraint of trade. The facts in that case and the opinion of the court are on all fours with the facts and the opinion in the case of *Mills*

v. *Ressler*, 87 Kansas, 549, cited by the Court of Appeals for the Tenth Circuit, in the Griffin case.

In the case of *Keith* v. *Herschberg*, 48 Ark. 146, a contract which gave to a merchant the exclusive right to sell a particular character of goods in the town of Booneville was upheld against the contention that it was in unreasonable restraint of trade and, therefore, void.

These two cases are cited with approval by the Supreme Court of Arkansas in *Fort Smith Light & Traction Company* v. *Kelley*, 94 Ark. 461. This case was relied upon by the trial court in its opinion, (R. 252) but was ignored by the Court of Appeals for the Eighth Circuit in its opinion. The 6th syllabus of that case (page 462) reads as follows:

> "A contract whereby a person agrees not to supply natural gas in a certain city is only in partial restraint of trade, and, is therefore, not void."

In that case the contract was between two parties, both of whom were engaged in the public business of supplying natural gas. It was contended by Kelley that, "If the contract did undertake to exclude defendants from Fort Smith for forty-nine years, it would be a restraint of trade and competition, against public law and policy, and unenforceable."

The Supreme Court of Arkansas answered this contention (page 475) in part, as follows:

> "But, should we be mistaken in holding that the contract is not one in restraint of trade, then we are of the opinion that at most, it could only be a contract in *partial* restraint of trade. *Under all the authorities and our own decisions, such contracts, when reasonable, are not against public policy, and therefore are not void. Keith* v. *Herschberg Optical Co.*, 48 Ark. 146; *Webster* v. *Williams*, 62 Ark. 101." (Italics ours.)

Further along in the opinion the Supreme Court of Arkansas said:

> "That courts of chancery will grant relief by injunction to prevent a breach of contract in partial restraint of trade is well settled."

Here was a contract which involved exactly the same public business which is involved in the present case. It was a contract which involved supplying gas to all of the inhabitants of the City of Fort Smith, and the contract ran for a period of forty-nine years. Yet, the Supreme Court of Arkansas, applying the same rule to this contract that it had previously applied to contracts between individuals, held that the contract was not invalid because it was only in *partial* restraint of trade.

In the later case of *Kimbrough* v. *Wells,* 112 Ark. 126, 130, the case of *Fort Smith Light & Traction Co.* v. *Kelley, supra,* and the case of *Webster* v. *Williams, supra,* were cited with approval in upholding a contract which was in partial restraint of trade.

Counsel for respondents, in their brief in opposition to the granting of petition for certiorari, made some point on the section of the Arkansas Constitution of 1874, which was quoted, but very apparently not relied upon by the court below in its opinion. This section of the Arkansas Constitution was in force when all of the above decisions of the Supreme Court of Arkansas were handed down. In other words, that section of the Arkansas Constitution has never been considered by the Supreme Court of the state as prohibiting contracts in partial restraint of trade. Moreover, that court has held that a monopoly may be granted to a public utility by or under the authority of an act of the legislature, notwithstanding this section of the Constitution. As construed by the Supreme Court of Arkansas, that section prohibits the granting of monopolies by the legislature only in connection with

businesses which are open as a matter of common right to all and for the conduct of which no franchise from the state or subdivision thereof is required.

The case of *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770, makes this entirely clear. The proposed monopoly in the ice business involved in that case was condemned solely on the ground that the conduct of the ice business is a matter of common right and requires no franchise for its conduct. The court in that case expressly recognizes the validity of exclusive franchises to public service companies and bridge companies and for ferries.

The statutes of Arkansas authorize municipalities to grant exclusive franchises for gas, electric light, and other utilities. C. & M. Digest, Section 7492, which amended Kirby's Digest, Sec. 5448 (both quoted in appendix). The validity of this Section has been recognized in *City of Eldorado* v. *Coates*, 175 Ark. 289, and *Cap F. Bourland Ice Co.* v. *Franklin Utilities*, 180 Ark. 770, and an exclusive franchise granted under this section (Kirby's Digest, 5448) was upheld in *Lackey* v. *Fayetteville Water Company*, 80 Ark. 108, 125, 135. Similar statutes relative to toll bridges and ferries have been upheld by that court in *McClintock* v. *Bovay*, 164 Ark. 482, and *McClintock* v. *White River Bridge Co.*, 171 Ark. 943.

It is difficult to understand on what theory a contract of a gas utility, said to be only in *partial*, restraint of trade, which clearly does not create a monopoly and is only claimed to *tend* in that direction, can be held to be illegal as opposed to the public policy of Arkansas when the statutes and decisions of the Supreme Court of that state expressly declare that a monopoly on the part of a gas utility is not illegal.

The test, and the only test which the Supreme Court of Arkansas has laid down with reference to contracts in partial restraint of trade, is the reasonableness of the contract. This is the same rule announced by the Court of Appeals for the Tenth Circuit in the Griffin case. No distinction is made by the Supreme Court of Arkansas by reason of the fact that one of the parties to the contract is a public utility. *Fort Smith Light & Traction Co.* v. *Kelley, supra.* In announcing a contrary rule, the court below has adopted a public policy for the State of Arkansas, in the federal courts, which is contrary to the public policy enforced in the state courts.

It was argued in respondent's brief in opposition to the granting of the writ of certiorari, that the contract is unreasonable because it is for the life of the gas field. In *Webster* v. *Williams,* 62 Ark. 101, the court said:

> "Was the contract void? Contracts in restraint of trade are either general or partial. Where the contract is unlimited as to space, it is general; where it is *limited as to space,* it is partial, although it may be unlimited as to time. * * * Contracts in partial restraint of trade, if they are reasonable and founded upon a legal consideration will be enforced." (Italics ours.)

The above is in exact accord with the opinion of this Court in *Fowle* v. *Park,* 131 U. S. 88, where contracts limited as to space, but unlimited as to time, were upheld against the plea that they were in unreasonable restraint of trade. The contract in the instant case was not only limited geographically, but was also limited to two existing plants.

In *Warmack* v. *Major Stave Company,* 132 Ark. 173, the Supreme Court of Arkansas said with reference to a contract between a public utility and one of its customers:

> "The principle that the company must supply all

impartially and without discrimination does not prevent it from entering into reasonable arrangements or agreements with its customers growing out of special circumstances."

It is submitted that the contract in question merely laid down reasonable business provisions with respect to the furnishing of gas in the quantities covered by the contract and was not in unreasonable restraint of trade, and that there exists no public policy of the State of Arkansas prohibiting or making illegal such a contract.

Some point is made of the fact that the Harding Glass Company is a very large consumer of gas, but the amount involved is nothing as compared with the amount involved in the case of *Fort Smith Light & Traction Company* v. *Kelley, supra,* or with the total public consumption in the Fort Smith area. But in addition thereto, it is the very fact that the Harding Glass Company is a relatively large individual consumer of gas, which makes the protection afforded by the contract reasonable.

The Twin City Pipe Line Company, as a public utility, is required to use ordinary diligence in providing reasonable facilities and a reasonable supply of gas for its customers, but it is not an insurer of that supply. If one of the manufacturers, using a large quantity of gas, has the right to take its gas, or not, at will, from the utility, as it undoubtedly does in the absence of a contract, then the investment made by the public utility to serve that customer may well be left idle and unproductive at the expense of the utility and the general public served by it. Financial considerations, if nothing else, would prevent the utility from developing or contracting for a supply of gas far in advance of present needs, when its large customers could quit it at will. Respondent's business, according to the undisputed testimony of its president, re-

quires an uninterrupted supply of a large amount of natural gas for a long period of time. In 1925 a few hours interruption in its gas supply resulted in the cooling of molten glass in the process of manufacture to respondent's damage in excess of $50,000—a damage peculiar to the particular business of respondent. (R. 224, 225.) The court determined that this interruption was not due to any negligence of the Twin City Company in the performance of its duty as a public utility (R. 138, 139.) It is apparent, therefore, that the susceptibility of this particular business to extraordinary damages for even partial interruption in its gas supply demanded the making of reasonable arrangements for the furnishing of facilities and gas reserves in excess of those required by the average customer and in excess of those which the Twin City Company was obligated to furnish and provide in the discharge of its duty as a public utility. In the light of these special circumstances the two parties, for a valuable consideration, entered into an agreement, the effect of which was to reasonably insure the furnishing of an adequate gas supply to respondent during the life of the petitioner's gas field, at a rate fixed by public authority. The results of the contract were an expansion of the business of the manufacturer, the construction of additional facilities for delivery of gas to it, and an immediate development of the gas producing territory. Obviously, such results were beneficial both to the public and to the parties. Having secured the benefit of the contract, the manufacturer then decided to take its own gas from its own subsidiaries or from the public utility, as might be most convenient to it, from day to day. (R. 148-151.)

The public policy of Arkansas, as announced by the Supreme Court of that State, does not require that any such flagrant breach of contract shall be tolerated.

The Harding Glass Company cannot well be heard to complain of a contract voluntarily entered into by it, and not the slightest public injury or probability thereof has been made to appear. The State of Arkansas has an anti-trust statute (Chapter 124 Digest of The Statutes of Arkansas, Crawford & Moses, 1921.) That statute should be regarded as fixing the public policy and the law of that state with respect to alleged monopolies. But it is not even contended that the contract in question comes within the prohibition of that statute.

Conclusion.

The evils which courts and legislatures have sought to prevent in prohibiting the enforcement of contracts in restraint of trade were summarized by Chief Justice White in *Standard Oil Co.* v. *United States*, 221 U. S. at 58:

> "* * * it may be with accuracy said that the dread of *enhancement of prices* and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were *unreasonably restrictive of competitive conditions*, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with *the intent to do wrong to the general public and to limit the right of individuals*, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." (Italics ours.)

It is submitted that the evils set out by Chief Justice White are not present in the contract here involved. The contract cannot enhance the price of gas in Fort Smith because that price is subject to public regulation. The contract was reasonable because the assurance of continued demand was essential to the Twin City Company in view of the peculiar nature of the Glass Company's business and the extent of the utility's investment to serve it. It cannot be said, therefore, that this contract was "unreasonably restrictive of competitive conditions." Nor were there any "surrounding circumstances" which would give rise to any inference that the contract was "entered into—with the intent to do wrong to the general public" or to "limit the right of individuals."

The thought expressed in *Hall Mfg. Co.* v. *Western Steel & Iron Works* (C. C. A. 7th), 227 Fed. 588, 593, that in all cases of this kind there must be balanced against the public interest that is opposed to restrictive covenants that other public interest which demands honesty and fidelity among our business men, finds support in *Baltimore and O. S. R. Co.* v. *Voigt*, 176 U. S. 498, where the following was quoted with approval:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

This same thought was repeated with emphasis in *Steele* v. *Drummond*, 275 U. S. 199, 205, and in the very

recent case of *Patton* v. *United States*, 281 U. S. 276, 306, it was said:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection."

The decree of the court below should be reversed and the decree of the trial court should be affirmed.

Respectfully submitted,

HARRY P. DAILY,
JOHN P. WOODS,
Counsel for Petitioners.

Appendix.

Acts of Arkansas 1921 (General) Act 124, Section 6.

"Section 6. That section 8 of the said Act No. 571 of the General Acts of the General Assembly of the State of Arkansas of 1919, above more particularly referred to, be and the same is hereby amended to read as follows:

"Section 8. Authority to Establish Rates. The commission shall have the power, after reasonable notice and after full and complete hearing, to enforce, originate and establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all public service corporations, companies and utilities and all rates and regulations with reference thereto and orders directing the performance of any duties devolving on said company, utility, common carrier or public service corporation under the terms of this act; and whenever the commission shall, after notice and hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of law, the commission shall, by an order, fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory, inadequate or otherwise in violation of any of the provisions of this law; provided, however, that nothing herein shall authorize said commission to make any rule, regulation or order whatever to be effective within the limits of any municipality of this State with reference to any tariff, rate, toll, schedule, duty or action of any public service corporation, company or public utility operating within such municipality as a street railroad, telephone company, gas company, pipe line company for transportation of oil, gas or water, electrical company, for the generation or distribution, sale or supply of electricity for heat, light or power, water company or hydro-electric company, it being the intention of this act, hereinafter more particularly expressed, to confer upon the municipal coun-

cils and city commissions of this State, jurisdiction as to such matters, so far as same are effective within the limits of any municipality of this State."

Section 7492, Digest of the Statutes of Arkansas, Crawford & Moses, 1921:

"SEC. 7492. Exclusive privileges. For the purpose of providing water, gas, electric light, heat, cold storage or street railroad, the mayor and council may contract with any person or company to construct and operate such utilities, and may grant to such person or company, for a time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purposes and may authorize such person or company to assign such contract or privileges and transfer such utility to any other person or company having authority to conduct any such business in the city, with full authority to the assignee or transferee to enjoy and use the same in like manner and to the same extent as the assignor could have done; and all such assignments and transfers which have heretofore been made, are hereby ratified and approved. Act March 19, 1925, p. 692."

Section 5448, Digest of the Statutes of Arkansas, Kirby, 1904."

"SEC. 5448. For the purpose of providing water, gas or street railroads, the mayor and council may contract with any person or company to construct and operate the same, and may grant to such person or company for the time which may be agreed upon the exclusive privilege of using the streets and alleys of such city for such purpose or purposes."